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No. 91-471

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,
v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; and
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

MOTION OF THE
AMERICAN IRON AND STEEL INSTITUTE,
AMERICAN PETROLEUM INSTITUTE,
CHEMICAL MANUFACTURERS ASSOCIATION,
EDISON ELECTRIC INSTITUTE, ET AL.,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION,
NATIONAL ASSOCIATION OF MANUFACTURERS, AND
NATIONAL ASSOCIATION OF METAL FINISHERS
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND
BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

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FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the American Iron and Steel Institute ("AISI"), American Petroleum Institute ("API"), Chemical Manufacturers Association ("CMA"), Edison Electric Institute, *et al.* ("EEI"),

Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), National Association of Manufacturers of the United States of America ("NAM"), and National Association of Metal Finishers ("NAMF") move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. *Amici* are individual utilities and trade associations representing generators of hazardous wastes and polychlorinated biphenyls whose access to Chemical Waste Management's Emelle, Alabama disposal facility has been restricted by the actions of the State of Alabama that are the subject of this case. *Amici* request leave to file the accompanying brief to inform the Court of the significance of the restrictions at issue to a wide range of manufacturers and other industries throughout the nation. Counsel for Petitioner Chemical Waste Management, Inc. consented to the filing of this brief; consent of counsel for Respondents Governor Hunt, *et al.*, was requested but refused. AISI, API, CMA, EEI, MVMA, NAM, and NAMF therefore request leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY	3
REASONS FOR GRANTING THE PETITION	5
I. THE MARKET IN HAZARDOUS WASTE AND PCB TREATMENT AND DISPOSAL SERVICES IS INTERSTATE IN NATURE	5
A. Federal Regulation Of Hazardous Waste And PCB Treatment And Disposal	6
1. Regulation of Hazardous Wastes Under the Resource Conservation and Recovery Act	6
2. Regulation of PCBs Under the Toxic Substances Control Act	8
3. Treatment and Disposal of Hazardous Wastes and PCBs from Site Cleanups	8
B. The Interstate Nature Of The Market For Hazardous Waste And PCB Treatment And Disposal Services	9
II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE ALABAMA'S ACTIONS HAVE UNLAWFULLY DISRUPTED INTERSTATE COMMERCE IN HAZARDOUS WASTE AND PCB TREATMENT AND DISPOSAL SERVICES	12
A. The Market For Treatment And Disposal Services Is And Must Remain Interstate In Nature	12
1. Replicating Every Needed Type of Treatment and Disposal Facility in Every State Is Economically Infeasible	12
2. Environmentally Suitable Sites for Treatment and Disposal Facilities Are an Unevenly Distributed Natural Resource	13

B. The Rationale Of The Alabama Supreme Court Now Restricts Interstate Commerce And Would Seriously Distort Interstate Commerce In Hazardous Waste And PCB Treatment And Disposal Services If Adopted By Other States	14
III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE RESTRICTING INTERSTATE COMMERCE IN TREATMENT AND DISPOSAL SERVICES ADVERSELY AFFECTS INTERSTATE COMMERCE GENERALLY	16
A. Balkanizing The Market For Hazardous Waste And PCB Treatment And Disposal Services Would Seriously Disrupt Interstate Commerce In A Wide Range Of Goods And Services	17
B. The Alabama Supreme Court's Rationale Could Be Extended To Justify Discriminatory Taxes On Other Commodities	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page(s)
<i>American Trucking Associations v. Scheiner</i> , 483 U.S. 266 (1987)	16
<i>Bacchus Imports, Ltd. v. Dias</i> , 468 U.S. 263 (1984)	16
<i>City of Burbank v. Lockheed Air Terminal, Inc.</i> , 411 U.S. 624 (1973)	15
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	14,16
<i>Hughes v. Oklahoma</i> , 441 U.S. 322 (1979)	14
<i>National Solid Wastes Management Association v. Alabama Department of Environmental Management</i> , 910 F.2d 713 (11th Cir. 1990), cert. denied, 111 S. Ct. 2000 (1991)	19
<i>New Energy Co. v. Limbach</i> , 486 U.S. 269 (1988)	16
<i>New England Power Co. v. New Hampshire</i> , 455 U.S. 331 (1982)	14
<i>Sporhase v. Nebraska</i> , 458 U.S. 941 (1982)	14
<i>West v. Kansas Natural Gas Co.</i> , 221 U.S. 229 (1911)	14
STATUTES:	
Comprehensive Environmental Response, Compensation, and Liability Act,	
42 U.S.C. §§ 9601 <i>et seq.</i>	9
42 U.S.C. § 9604	9
42 U.S.C. § 9606	9
Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984)	6
Resource Conservation and Recovery Act,	
42 U.S.C. §§ 6901 <i>et seq.</i>	6
42 U.S.C. § 6921	6
42 U.S.C. § 6924	6,7,9

Table of Authorities Continued

	Page
Toxic Substances Control Act, 15 U.S.C. § 2605(e)	8
REGULATIONS:	
40 C.F.R. Part 261	6
40 C.F.R. § 264.97	6
40 C.F.R. § 264.301	6
40 C.F.R. Part 268	7
40 C.F.R. § 268.42, Table 1	7
40 C.F.R. Part 761	8
40 C.F.R. § 761.60-761.79	8
50 C.F.R. § 761.65(a)	8
55 Fed. Reg. 22520 (June 1, 1990)	7,9
56 Fed. Reg. 7134 (Feb. 21, 1991)	10
56 Fed. Reg. 41164 (Aug. 19, 1991)	10
MISCELLANEOUS:	
21 Env't Rep. (BNA) 1179 (Oct. 19, 1990)	16
22 Env't Rep. (BNA) 347 (June 14, 1991)	13
Inside E.P.A. Weekly Report, August 30, 1991	15
National Petroleum News—1991 Fact Book, vol. 83, no. 7	18
National Solid Wastes Management Association, "Interchange of Hazardous Waste Manage- ment Services Among States" (1990)	9,10
N.Y. Times, Sept. 8, 1991, § 4, at 5	15
U.S. EPA Office of Solid Waste and Emergency Response, <i>The Hazardous Waste System</i> (June 1987)	11

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INTEREST OF AMICI CURIAE

Amici American Iron and Steel Institute ("AISI"),
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facturers Association ("CMA"), Motor Vehicle Manufac-
turers Association of the United States, Inc. ("MVMA"),

National Association of Manufacturers of the United States of America ("NAM"), and National Association of Metal Finishers ("NAMF") are non-profit trade associations. AISI's members include 40 domestic companies that account for approximately 80 percent of the raw steel production in the United States. API represents over 250 member companies engaged in all aspects of the petroleum industry, including exploration, production, refining, transportation and marketing. CMA's 180 U.S. member companies represent more than 90 percent of the production capacity of basic industrial chemicals within this country. MVMA's members are domestic companies engaged in the manufacture and sale of motor vehicles; they assemble 92 percent of the cars, trucks, and buses produced in the United States and operate more than 300 manufacturing facilities. NAM's members include over 13,000 companies and subsidiaries, employing 85 percent of all manufacturing workers and producing over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council. NAMF represents approximately 950 metal finishing companies throughout the United States.

Amici Edison Electric Institute, *et al.*, represent all segments of the electric utility industry. The Edison Electric Institute is the national association of investor-owned electric utility companies, the National Rural Electric Cooperative Association is the national association of rural electric cooperatives, and the American Public Power Association is the national association of publicly-owned utilities. These associations are joined by 63 individual electric utility companies (listed in the Appendix to this brief), which generate and distribute electricity to communities throughout the United States. Together, these individual utilities and the members of the three associations serve more than 95 percent of the nation's consumers of electricity.

Despite significant and successful efforts at waste reduction and recycling, many of the members of the *amici*

organizations generate hazardous wastes. Many have relied upon the permitted landfill facility in Emelle, Alabama ("the Emelle facility") owned by Petitioner Chemical Waste Management, Inc. for the secure disposal of hazardous wastes generated both in their production processes and in the cleanup of sites used in the past for waste disposal and handling. Some of these companies in the past also chose to gain an extra measure of environmental security by sending nonhazardous wastes to the Emelle facility, even though they were under no regulatory compulsion to do so. The Alabama law challenged in this case has made many member companies seek alternative disposal service or, where no adequate alternative is available, has significantly increased their disposal costs.

Some members of the *amici* organizations, in particular those representing the electric utility industry, also generate polychlorinated biphenyl ("PCB") wastes. PCBs have been used for many years in transformers, capacitors and other equipment required for transmission and distribution of electric power, because of their dielectric (non-conducting) and fire-resistant properties. Before Alabama adopted the challenged law, many of the *amici* shipped PCB wastes to the Emelle facility for disposal.

The outcome of this case will have a direct impact on *amici* members as hazardous waste and PCB waste generators. Allowing this law to stand will have economic consequences at all levels of the production chain and will potentially have an economic and competitive effect on the activities of the members of these associations.

INTRODUCTION AND SUMMARY

Amici support the constitutional challenges to Alabama Act No. 90-326 presented in the Petition for a Writ of Certiorari filed by Chemical Waste Management, Inc. This brief focuses in particular on the serious impact on interstate commerce of the discriminatory \$72 per ton "additional fee" imposed by the Alabama statute on wastes generated outside Alabama and treated or disposed of at the Emelle facility.

Alabama's discriminatory fees for out-of-state use of commercial hazardous waste treatment and disposal services located in the state have severely disrupted interstate commerce in these services. Not only is the Emelle facility an integral part of the existing interstate market for these services, but if this Court allows the decision of the Alabama Supreme Court to stand, other states almost certainly will follow Alabama's lead and impose similar restrictions on access to treatment and disposal services within their borders by out-of-state waste generators.

Restrictive measures such as those adopted by Alabama cannot be justified by any purported environmental risk nor as a matter of purely local interest. Hazardous wastes or PCB wastes generated in Alabama are chemically and physically indistinguishable from those generated in other states. Alabama's claim that wastes generated in other states are produced solely for the benefit of the citizens of those states also ignores the interdependence of the states in the national economy. Not only do numerous out-of-state waste generators produce goods that are used by and for the benefit of Alabama residents, but Alabama generators avail themselves of waste treatment and disposal services in other states. Thus, a Balkanized market for hazardous waste and PCB treatment and disposal services is just as inimical to the Commerce Clause as would be a Balkanized market for coal, natural gas, agricultural products, or any other natural or manufactured product.

Moreover, because hazardous waste and PCB treatment and disposal services are today integral to the manufacturing processes that generate these wastes, disruption of interstate commerce in these services directly affects interstate commerce in a wide range of other commodities. One of the major achievements of the environmental movement over the past few decades has been the recognition, on the part of industry, government, and society at large, that the minimization, management, and secure disposal of industrial wastes is as much a part of the manufacturing process as is obtaining fuel, raw materials, and labor. Industrial wastes—particularly hazardous wastes and PCBs—

cannot be randomly dumped or buried. Instead, proper waste treatment and disposal services must be provided or purchased as an integral component of the overall manufacturing process.

A sophisticated market, involving significant interstate exchanges, has developed to meet the demand for these services. Economic and environmental factors combine to make this market interstate in nature. To site in each state each of the numerous types of facilities required to provide the treatment and disposal services necessary today would be economically inefficient and impractical. In addition, due to geology and other environmental limitations, the 50 states are not equally suited for the siting of each type of facility needed by U.S. industry.

To avoid the existing and potential economic disruption that flows from the Alabama Supreme Court's decision, *amici*, representing a wide array of U.S. industry, respectfully urge this Court to grant the petition and reverse the decision of the Alabama Supreme Court.

REASONS FOR GRANTING THE PETITION

I. THE MARKET IN HAZARDOUS WASTE AND PCB TREATMENT AND DISPOSAL SERVICES IS INTERSTATE IN NATURE.

As a practical matter, stringent federal regulatory schemes promulgated to protect against the potential risks associated with the treatment and disposal of hazardous wastes and PCBs influence the character of the market for waste treatment and disposal services. These schemes dictate that U.S. industry employ a wide variety of sophisticated technologies, which for economic and environmental reasons cannot all be provided within each of the 50 states. Therefore, the market today for hazardous waste and PCB treatment and disposal services, in which the Emelle facility is a vital element, is an interstate market.

A. Federal Regulation Of Hazardous Waste And PCB Treatment And Disposal.

1. Regulation of Hazardous Wastes Under the Resource Conservation and Recovery Act.

The treatment and disposal of discarded industrial materials that have been classified as "hazardous waste"¹ is regulated by the United States Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.* Under Subtitle C of RCRA, EPA has promulgated a "cradle to grave" system that regulates the transportation, storage, treatment, and disposal of hazardous waste. Specifically, subject to a few narrow regulatory exceptions, hazardous wastes may be stored on-site in unpermitted facilities for only a limited period of time; may be transported only by registered hazardous waste transporters; and may be stored, treated and disposed of only at permitted facilities. To obtain a RCRA permit, a facility must meet stringent siting, design, and operating requirements.²

In addition to the stringent baseline requirements of RCRA Subtitle C, another vital factor influencing the market for hazardous waste treatment and disposal services is the RCRA Land Disposal Restrictions program. Pursuant to the Hazardous and Solid Waste Amendments of 1984,³ EPA has issued regulations requiring that, before land disposal, most hazardous wastes must be treated to a level, or by a method, prescribed by EPA that reduces

¹ A hazardous waste is any solid waste that either (1) has been specifically listed by rule as a hazardous waste, or (2) exhibits one of several characteristics of hazardous waste that have been defined by rule. See 42 U.S.C. § 6921; 40 C.F.R. Part 261.

² For example, under EPA's regulations, a hazardous waste landfill must employ technological measures aimed at protection of groundwater resources, including synthetic membrane liners, leachate collection systems, and groundwater monitoring networks. See 40 C.F.R. §§ 264.97, 264.301.

³ Pub. L. No. 98-616, § 201, 98 Stat. 3221, 3226-33 (1984) (codified at 42 U.S.C. § 6924).

the toxicity or mobility of hazardous constituents. See 40 C.F.R. Part 268; 42 U.S.C. §§ 6924(d), (e), (g) & (m). EPA has promulgated its RCRA hazardous waste treatment standards based upon the Best Demonstrated Available Technology for each waste. See, e.g., 55 Fed. Reg. 22520, 22524-25 (June 1, 1991).

Two important results follow from this waste treatment program. First, although the amount, toxicity or mobility of hazardous wastes are reduced by the prescribed treatment, virtually every treatment process ultimately produces *some* residue that must—and legally may—then be land disposed in a facility with proper authorization under Subtitle C of RCRA. For example, many hazardous wastes must be treated by high-temperature incineration; the ash that results is almost always itself classified as a hazardous waste. Therefore, the need for permitted landfill facilities, such as the Emelle facility, continues. Second, because of the wide variety of hazardous wastes produced in this country and EPA's efforts to identify the best treatment technology for each waste, a host of different technologies are necessary today to meet the needs of U.S. industry.⁴

Treatment and disposal facilities with the requisite operating authorization under Subtitle C of RCRA are scarce. There are, for example, only 20 commercial landfills in the country that can lawfully dispose of hazardous wastes and even fewer permitted commercial hazardous waste incinerators. Thus, waste generators in many states have no choice but to use treatment and disposal services in other states. Because the Emelle facility is the largest permitted landfill in the country, and because its hydrogeological setting is particularly well-suited for landfill operations, this facility has been widely used by generators seeking to ensure that their hazardous wastes are securely and lawfully disposed.

⁴ The RCRA hazardous treatment regulations, which are subject to revision and expansion, are currently based on 29 different technologies. See 40 C.F.R. § 268.42, Table 1.

2. Regulation of PCBs Under the Toxic Substances Control Act.

Polychlorinated biphenyls ("PCBs"), while not classified as hazardous wastes under RCRA, also require specialized treatment and disposal facilities. PCBs were once used for a variety of purposes, but most extensively in transformers and other electrical equipment. The manufacture of PCBs was essentially banned by Congress as of 1978, and the phaseout and disposal of PCBs in use at that time is regulated by EPA under section 6(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2605(e); *see also* 40 C.F.R. Part 761.

EPA's TSCA regulations require that PCBs and articles containing PCBs above certain concentrations (such as drained transformer carcasses or soils in which PCBs have been spilled) be disposed of in incinerators or landfills approved by EPA. 40 C.F.R. §§ 761.60-761.79. Nationally, only seven incinerators and eight landfills, including the Emelle facility, are approved for disposal of electrical equipment that contained PCBs or other PCB wastes. Of the eight landfills, only two are east of the Rocky Mountains.⁵ Many of the *amici*, particularly the electric utility industry, are presently facing a severe shortage of PCB disposal capacity, a problem exacerbated by an EPA regulation that requires PCB wastes to be disposed of within one year after being placed into storage for disposal.⁶

3. Treatment and Disposal of Hazardous Wastes and PCBs from Site Cleanups.

Another element that has created a need for an interstate market in waste treatment and disposal services is the need to treat and dispose of materials removed during

⁵ The EPA-approved PCB landfills are in Alabama, New York, California, Idaho, Nevada, Oregon and Utah (two facilities).

⁶ 40 C.F.R. § 761.65(a). However conscientiously these generators take their regulatory obligations, they risk substantial penalties for noncompliance if disposal capacity shortages force them to violate the one-year deadline.

cleanups of sites at which hazardous wastes or PCBs were handled or disposed of in the past. In 1980, Congress reacted to the problems caused by certain past waste handling and disposal practices by enacting the Comprehensive Environmental Response, Compensation, and Liability Act (known as "CERCLA" or "Superfund").⁷ This statute created a mechanism by which EPA can either compel the cleanup of sites that pose a threat to the environment or clean up those sites itself. 42 U.S.C. §§ 9604, 9606. In addition, RCRA requires an applicant for a facility permit to undertake corrective action with regard to any release of hazardous wastes or constituents from existing waste management units at the facility. 42 U.S.C. § 6924(u).

Many materials removed from sites being remediated voluntarily or under CERCLA or RCRA must be treated and disposed of in full compliance with EPA's RCRA and TSCA rules. While some of these wastes are managed on-site, many are sent to commercial treatment and disposal facilities. These wastes impose a substantial additional burden on the nation's limited hazardous waste and PCB treatment and disposal capacity.⁸

B. The Interstate Nature Of The Market For Hazardous Waste And PCB Treatment And Disposal Services.

A substantial interstate market for the treatment and disposal of hazardous wastes and PCBs currently exists. Approximately 250 million tons of hazardous wastes are generated annually in the United States.⁹ In 1987, before the RCRA treatment program was fully effective, approximately 3.7 million tons were shipped between states for

⁷ Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601 *et seq.*).

⁸ See, e.g., 55 Fed. Reg. 22520, 22631-50 (June 1, 1990) (variance from RCRA treatment program based on lack of available treatment capacity for certain wastes).

⁹ National Solid Wastes Management Association, "Interchange of Hazardous Waste Management Services Among States," at 4 (1990) ("NSWMA Study").

treatment and disposal.¹⁰ The need for specialized services to comply with the RCRA treatment program, as well as new regulations limiting the burning of certain hazardous wastes in industrial boilers and furnaces,¹¹ has likely increased the volume of wastes requiring interstate access to treatment and disposal services.

A recent study revealed that, in 1987, an average state sent hazardous wastes to 19 states and received hazardous wastes from 19 states. NSWMA Study, *supra* note 9, at 8. Industries in an average state utilized 12 different types of waste treatment or disposal services located in other states. *Id.* The study also reveals that even Alabama, although it is a net importer of hazardous wastes (receiving waste shipments from 37 states), sends significant amounts of hazardous wastes out-of-state. *Id.* at 22. Specifically, in 1987, Alabama generators sent 52,000 tons of waste to treatment and disposal facilities in 23 other states. Thus, Alabama industries are taking advantage of the interstate market in treatment and disposal services at the same time Alabama is restricting the access of out-of-state generators to one of the most important elements of that market.

Like these Alabama industries, many *amicus* member companies are substantial consumers of interstate hazardous waste and PCB treatment and disposal services. For example, EPA's treatment standard for electric arc furnace dust (a waste produced by the steel industry) is based on high temperature metals recovery. *See* 56 Fed. Reg. 41164 (Aug. 19, 1991). This technology is available at only a handful of facilities. Further, many of the major steel-producing states, such as Illinois, West Virginia, and Michigan, contain no facility capable of treating a number of

¹⁰ *Id.* at 15.

¹¹ *See* 56 Fed. Reg. 7134 (Feb. 21, 1991). This rule eliminates an exemption from EPA's RCRA regulations that had allowed certain hazardous wastes to be burned for energy recovery in boilers and industrial furnaces. Waste generators who have relied on this exemption must now either obtain permits (an arduous and costly procedure) or send their wastes to permitted facilities for treatment and disposal.

the hazardous wastes produced by steel plants. Therefore, steel producers in most states must rely on out-of-state treatment and disposal services.

Similarly, the petroleum refining industry requires access to hazardous waste treatment or disposal services, particularly incineration, that are available in only a limited number of states.¹² For example, California, which has approximately 30 oil refineries, has no commercial hazardous waste incineration capacity for refinery wastes. Moreover, the siting of any new hazardous waste incinerator in California is very difficult today because of stringent new restrictions on air emissions within the Los Angeles basin, and other obstacles under state law to facility siting throughout the state. Therefore, refinery wastes generated in California, as well as in a number of other states, typically must be shipped between states.¹³

In addition to the interstate market for commercial treatment and disposal services, a number of companies that operate their own hazardous waste treatment and disposal facilities have centralized the locations of technologies they must employ to comply with the RCRA treatment program.¹⁴ Sending all wastes of a certain type to

¹² In 1987, there were only 14 commercial hazardous waste incinerators in the United States. U.S. EPA Office of Solid Waste and Emergency Response, *The Hazardous Waste System* at A-2 (June 1987). Very few new facilities have begun operation since that time.

¹³ Information compiled by *amicus* API in 1990 indicates that at least 20 states containing refineries have no commercial facilities capable of treating refinery wastes.

¹⁴ Several steel companies, for example, have their own facilities capable of treating and disposing of hazardous wastes from plants in several states owned by the same company. One company has a tin recovery plant capable of processing tin plating wastes from a sister plant in another state. Another has an acid regeneration plant that processes waste acids from a sister plant in another state. In addition, several steel companies, each with plants in several states, are faced with limited commercial facilities that can perform high temperature metals recovery on electric arc furnace dust and are now considering building centralized plants to treat their own wastes.

one location is much more economical for these companies than building duplicative treatment or disposal facilities at each plant that generates a particular type of waste. This centralization often necessitates the interstate shipment of hazardous wastes between intracompany facilities.¹⁵

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE ALABAMA'S ACTIONS HAVE UNLAWFULLY DISRUPTED INTERSTATE COMMERCE IN HAZARDOUS WASTE AND PCB TREATMENT AND DISPOSAL SERVICES.

A. The Market For Treatment And Disposal Services Is And Must Remain Interstate In Nature.

Treatment and disposal services for hazardous wastes and PCBs today are as integral a component of manufacturing processes as supplies of energy or raw materials. Just as the U.S. economy could not run efficiently if manufacturers had to obtain all their raw materials from within their home states, so the U.S. economy cannot rely on a Balkanized system of hazardous waste and PCB treatment and disposal services. The market for these services is necessarily interstate because of the manifest inefficiency in replicating each necessary technology in every state and because states vary substantially in their suitability as locations for particular types of waste management facilities.

1. Replicating Every Needed Type of Treatment and Disposal Facility in Every State Is Economically Infeasible.

As discussed above, the RCRA hazardous waste treatment program forces industry to employ numerous different treatment and disposal technologies. This multiplicity of technologies is a direct result of the widely varying universe of hazardous wastes and EPA's regulatory identification for each waste of the technology that minimizes the toxicity or mobility of residues that must be land dis-

¹⁵ While the Alabama law challenged in this proceeding does not affect these transfers, other restrictions on interstate waste transfers could. See *infra* p. 16.

posed. Some of these technologies are used for a relatively small volume of wastes.

The quantity of wastes that must be treated or disposed of at any particular type of facility is generally insufficient to justify the high capital cost of constructing these sophisticated facilities in every state. Moreover, as in other industries, economies of scale make it inefficient to construct multiple smaller units. Just as requiring a manufacturer to obtain all of its fuel, semiconductors, steel parts, or other components strictly from in-state sources would seriously disrupt interstate commerce, so requiring a manufacturer to obtain all of its hazardous waste and PCB treatment and disposal services from in-state sources would seriously disrupt interstate commerce.¹⁶

2. Environmentally Suitable Sites For Treatment And Disposal Facilities Are An Unevenly Distributed Natural Resource.

A second reason that the market for hazardous waste and PCB treatment and disposal services is, and must be, national in scope is that states vary significantly in their suitability for siting the necessary facilities. For example, landfills generally are sited in areas that present the minimum possible chance for hazardous constituents to migrate into groundwater. The location of the Emelle facility is particularly well suited for hazardous waste landfill operations because it lies over hundreds of feet of highly impermeable chalk that would protect the underlying groundwater aquifer in the event that RCRA protective systems were to fail.¹⁷ In contrast, most of Florida is un-

¹⁶ As a practical matter, in addition to economic and environmental constraints, the time required to obtain the necessary permits to construct new hazardous waste management facilities, substantial public opposition to their siting, and even some state-wide moratoria on their siting, such as that recently adopted by Texas (see 22 Env't Rep. (BNA) 347 (June 14, 1991)), make it virtually impossible to duplicate all treatment and disposal options within each state in the foreseeable future.

¹⁷ Environmental considerations also influence waste generators' choices among alternative treatment and disposal services, because of their desire to avoid future liability under CERCLA.

suitable for a hazardous waste landfill because the underlying rock is highly permeable and the water table is high. Similarly, deep well injection (another hazardous waste disposal technology) requires specific geological conditions that are found in only a few areas, while restrictions on air emissions increases imposed by the 1990 Clean Air Act Amendments effectively limit those areas where new hazardous waste incinerators can be sited.

Environmentally suitable locations for hazardous waste and PCB treatment and disposal facilities, therefore, are valuable natural resources just like concentrations of coal, iron or natural gas. This Court has repeatedly rejected attempts by states to reserve their natural resources for in-state users:

If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. . . . If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines.

West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911).¹⁸ Alabama's attempt to reserve its valuable waste disposal resource for in-state users should similarly be invalidated.

B. The Rationale Of The Alabama Supreme Court Now Restricts Interstate Commerce And Would Seriously Distort Interstate Commerce In Hazardous Waste And PCB Treatment And Disposal Services If Adopted By Other States.

The Alabama law at issue in this case has caused many of the *amici* members to incur significantly higher costs,

¹⁸ See also, e.g., *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (unlawful restriction on export of groundwater); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (unlawful restriction on export of hydroelectric power); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (unlawful restriction on export of minnows); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (unlawful reservation of solid waste landfill capacity).

or to reduce their hazardous waste and PCB shipments to the Emelle facility and find other options for disposal. The resulting decline in shipments to Emelle has increased the demand for landfill capacity in other states and exacerbated the pre-existing shortage of available disposal facilities. Generators of PCB wastes in particular, such as the electric utility and steel industries, are facing an extreme shortage of capacity.

Even more serious than the effects of Alabama's restrictions on access to the Emelle facility will be the consequences when other states inevitably follow Alabama's lead.¹⁹ A number of other states have already adopted,²⁰ or are on the verge of adopting,²¹ measures to restrict access by out-of-state generators to treatment and disposal services within their borders. If the decision below is not reversed, these states and others will likely emulate Alabama and impose discriminatory fees or other restrictions that effectively limit or ban out-of-state wastes.²² In that event, many companies either will have no access to the hazardous waste treatment and disposal services necessary to meet their obligations under RCRA and TSCA or will have to pay exorbitant fees for these services, placing them at a competitive disadvantage in relation to companies in states that have such facilities.

¹⁹ See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (considering cumulative impact of others following challenged action in determining federal preemption claim).

²⁰ Considerable litigation has resulted from these actions. See, e.g., Chemical Waste Management' Inc.'s Petition for Certiorari at 15-17 & n.8.

²¹ Legislation is currently pending in at least eight states (Arizona, Colorado, Kentucky, Louisiana, Nevada, New Jersey, Ohio, and South Carolina) to restrict the ability of in-state facilities to accept hazardous wastes generated out-of-state.

²² See, e.g., Inside E.P.A. Weekly Report, August 30, 1991, at 12 (discussing recommendation of National Governors' Conference that states should be authorized to ban imports of out-of-state wastes); N.Y. Times, Sep. 8, 1991, § 4, at 5 (New York, Louisiana, and Alabama discouraging hazardous waste imports through caps and high taxes.)

Even the intra-company waste transfers described above, *supra* p. 12, while not covered by the Alabama law, will likely be affected. For example, New York has already begun imposing restrictions on receipt of out-of-state wastes through individual facility permits, which are applicable to both commercial and in-house facilities.²³

Restrictions on access to permitted treatment and disposal facilities also drive up the costs of remediating sites, thereby discouraging voluntary cleanup efforts, decreasing the cost effectiveness of expenditures from the Superfund, and increasing the potential liabilities of U.S. industry and governmental units under CERCLA and RCRA. These increased costs not only will ultimately be reflected in the cost of affected manufacturers' products, but also will likely produce a serious environmental cost by slowing the pace of site cleanups.

Accordingly, the challenged Alabama law has serious national ramifications that require intervention by this Court. The in-state favoritism and economic Balkanization fostered by the Alabama Supreme Court decision is precisely the evil at which the Commerce Clause is aimed.²⁴

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE RESTRICTING INTERSTATE COMMERCE IN TREATMENT AND DISPOSAL SERVICES ADVERSELY AFFECTS INTERSTATE COMMERCE GENERALLY.

If not reversed, the Alabama Supreme Court decision will likely have deleterious effects on interstate commerce extending well beyond the effects on the interstate market

²³ See 21 Env't Rep. (BNA) 1179 (Oct. 19, 1990).

²⁴ See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (unlawful tax credit favoring ethanol manufactured in-state); *American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 280-81 (1987) (unlawful tax on out-of-state trucks); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (unlawful tax exemption for liquor produced in-state); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (unlawful ban on out-of-state solid waste).

in hazardous waste and PCB treatment and disposal services described above. First, because these services are an essential component of industrial processes, restrictions on their use grant substantial competitive advantages to industries located in states with adequate treatment and disposal capacity while disadvantaging industries located in states without such capacity. Second, the rationale used by the Alabama Supreme Court to justify its decision could be extended to justify taxes on out-of-state consumption of other commodities, particularly scarce natural resources.

A. Balkanizing The Market For Hazardous Waste And PCB Treatment And Disposal Services Would Seriously Disrupt Interstate Commerce In A Wide Range Of Goods And Services.

Because hazardous waste and PCB treatment and disposal services are an integral component of most industrial and manufacturing processes, disruption of the interstate market in such services has ramifications beyond the waste management industry. The resulting increased cost or restricted supply of these services ultimately will increase the costs of products manufactured in states that lack adequate in-state treatment and disposal capacity. Industries in these states will have great difficulty maintaining competitiveness and some could even be forced to shutdown because of a lack of access, on an economical basis, to this necessary service. At the same time, industries in states that have treatment and disposal facilities adequate to meet in-state needs would be economically favored over out-of-state competitors through preferential access to this vital resource.

Alabama's effort to portray its law as a matter of purely local concern ignores the interdependence of the national economy and the integral relation of hazardous waste and PCB treatment and disposal services to that economy. Contrary to Alabama's view, the wastes sent to the Emelle

facility from other states are not produced solely for the benefit of out-of-state residents.²⁵

Some of those wastes are generated either in the manufacture of final products used by Alabama citizens or in the production of intermediate products used by Alabama industries. For example, a metal plating company located in Georgia receives parts from a company in Alabama, plates the parts in Georgia, and returns them to the Alabama company for further processing and distribution in interstate commerce. In the plating process, the Georgia company generates hazardous wastes.²⁶ Before the challenged law took effect, the company disposed of these wastes at the Emelle facility because no commercial hazardous waste landfills exist within Georgia. Faced with the discriminatory fee, the plating company diverted its wastes to a facility in South Carolina. If South Carolina and other states that contain facilities suitable for disposal of this waste follow Alabama's lead, the Georgia plating company will not be able to compete effectively with plating operations within those states. Similarly, many other industries may find it impossible or prohibitively expensive to operate if access to vital waste treatment and disposal services is further restricted by other states.

B. The Alabama Supreme Court's Rationale Could Be Extended To Justify Discriminatory Taxes On Other Commodities.

The principal rationale adopted by the Alabama Supreme Court—that Alabama residents should be compensated for risks posed by wastes from other states—could be used to

²⁵ Ironically, a company located in Alabama manufactured half of the PCBs ever produced in the United States. *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue*, Civil Action No. CV 90-1098 (Cir. Ct. Montgomery Co., Ala. 1990), Tr. 167 (testimony of Roger Henson). Nevertheless, Alabama is now attempting to limit the disposal within Alabama of those very PCBs.

²⁶ As another example, Alabama residents consume billions of gallons of petroleum products (e.g., gasoline and fuel oil) each year, almost all of which comes from processes that generate hazardous wastes outside the state. See National Petroleum News—1991 Fact Book, vol. 83, no. 7.

justify similarly disruptive taxes on other commodities. The Alabama Supreme Court justified the discriminatory fee on the ground that it protects Alabama citizens from the environmental effects of the disposal of wastes generated in other states. This parochial attitude ignores the plain fact—confirmed by the Alabama trial court—that hazardous wastes and PCB wastes generated outside Alabama are chemically and physically indistinguishable from those generated within Alabama and, therefore, pose no greater risk.²⁷ Even more unfairly, it disregards the costs, including environmental costs, associated with goods produced in other states and consumed by the citizens of Alabama. For example, in producing goods for an Alabama consumer, the Georgia plating company described above produces air emissions and water discharges that must be “borne” by Georgia residents. Indeed, most industrial processes produce air or water emissions, which under the logic of the Alabama Supreme Court could be said to “burden” local residents. Yet, their products typically are shipped throughout the nation to the advantage of all.

If the decision of the Alabama Supreme Court is not reversed, its rationale will allow states to tax products shipped out of state to compensate for these burdens. For example, states that produce coal, iron, natural gas, and other scarce raw materials could tax out-of-state shipments to compensate in-state residents for the environmental costs of extracting these materials. In-state users of these commodities would then gain a substantial competitive advantage over out-of-state users. Clearly, these taxes would have a deleterious effect on interstate commerce, yet they follow directly from the rationale adopted by the Alabama Supreme Court. To avoid these consequences, this Court

²⁷ *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue*, Civil Action No. CV 90-1098 (Cir. Ct. Montgomery Co., Ala. 1990), reprinted in *Chemical Waste Management Petition for Certiorari* at 86a; accord, *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 720 (11th Cir. 1990), cert. denied, 111 S.Ct. 2000 (1991).

should grant certiorari to review and reverse the decision of the Alabama Supreme Court.

CONCLUSION

For the reasons stated above, Chemical Waste Management, Inc.'s Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX**LIST OF ELECTRIC UTILITY AMICI CURIAE**

American Electric Power Service Corporation
Appalachian Power Company
Atlantic City Electric Company
Baltimore Gas & Electric Company
Boston Edison Company
Carolina Power & Light Company
Centerior Energy Corporation
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central & South West Services, Inc.
Cincinnati Gas & Electric Company
Columbus Southern Power Company
Commonwealth Edison Company
Consolidated Edison Company of New York, Inc.
Consumers Power Company
Dayton Power & Light Company
Delmarva Power & Light Company
Duke Power Company
Duquesne Light Company
Florida Power & Light Company
Holyoke Water Power Company
Houston Lighting & Power Company
Illinois Power Company
Indiana Michigan Power Company

Indianapolis Power & Light Company
Iowa Power & Light Company
Iowa Public Service Company
Jersey Central Power & Light Company
Kansas City Power & Light Company
Kentucky Power Company
Madison Gas & Electric Company
Minnesota Power & Light Company
Monongahela Power Company
Montauk Electric Company
New England Electric System
Niagara Mohawk Power Corporation
Northeast Utilities Service Company
Ohio Edison Company
Ohio Power Company
Ohio Valley Electric Corporation
Oklahoma Gas & Electric Company
Pacific Gas & Electric Company
Pacificorp dba Pacific Power & Light Company and
Utah Power & Light
Pennsylvania Power & Light Company
Philadelphia Electric Company
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
Public Service Electric & Gas Company
Tampa Electric Company
Texas Utilities Electric Company
The Cleveland Electric Illuminating Company

The Connecticut Light & Power Company
The Detroit Edison Company
The Potomac Edison Company
Toledo Edison Company
Union Electric Company
Virginia Electric & Power Company
West Penn Power Company
Western Massachusetts Electric Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company
Wisconsin Public Service Corporation